

stations that choose not to be carried on a cable system -- enable a network affiliate that elects retransmission consent to prevent cable subscribers from obtaining access to all network programming.

Under Section 325, a station may decide to withhold its consent from the operator, or may seek to exact terms for its consent on which a system and the station cannot reach agreement. Operators, however, will be unable to provide their subscribers with programming from another network affiliate if exclusivity rights are asserted.^{23/}

The Commission summarily dismissed NCTA's Petition for Rulemaking on this issue, and refused to consider the views of other cable commenters that raised this issue in this proceeding. The Commission based this summary rejection on its interpretation of an ambiguous passage from the Senate Report that is hardly dispositive of this issue.^{24/} It is surely not clear from the legislative history -- or from anything in the language of the statute -- that Congress meant for its retransmission consent provisions to lead to a reduction in the availability of broadcast signals to cable subscribers. But that is precisely what the Commission's interpretation would allow.

23/ This would be the case even where the more distant affiliate is a must carry station. As described earlier, the FCC refused to grant operators relief from its exclusivity rules, even though they may cause blackouts of must carry stations.

24/ Report and Order, at para. 180.

Congress did not codify the Commission's network non-duplication rules in the statute. In fact, there is no indication that Congress was even aware that a system might not be able to provide subscribers with any network programming. The Commission has discretion to ensure that the public interest is served by this new signal carriage environment. It should exercise that discretion to ensure the continued availability of network programming to cable subscribers.

C. Prohibiting Exclusive Retransmission Consent Agreements is Not Warranted

The Report and Order concluded that:

in view of the concerns that led Congress to regulate program access and cable signal carriage agreements, we believe that it is appropriate to extend the same nonexclusivity safeguards to noncable multichannel distributors with respect to television broadcast signals, at least initially. Accordingly, we will prohibit exclusive retransmission consent agreements between television broadcast stations and cable operators.

Report and Order para. 179. This ruling stands in stark contrast to the Commission's view that "as a general matter, the public interest in exclusivity in the sale of entertainment programming is widely recognized."^{25/} It also is contrary to the Commission's belief that broadcasters should be entitled to obtain and enforce exclusivity, in the form of network non-duplication and syndex,

25/ Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-265 (rel. April 30, 1993) at para. 63.

against cable operators -- even if they have opted for retransmission consent.

In addition, this rule is clearly not compelled by the program access provisions of the Act. Contrary to the impression reflected in its Report and Order here, exclusive contracts between cable operators and vertically integrated program suppliers are not banned in the Act, but rather may be justified upon a public interest showing. And exclusive contracts between operators and unaffiliated program suppliers -- such as any of the broadcast networks -- are specifically not within the scope of Section 19's prohibition. Accordingly, there is no support in Section 325 of the Act -- or elsewhere -- for the Commission's adoption of this broad prohibition.

D. The Superstation Exemption Should Apply to Superstations Delivered By Microwave.

Finally, the Act exempts from the retransmission consent requirement any superstation signal "if such signal was obtained from a satellite carrier and the originating station was a superstation on May 1, 1991."^{26/} The Commission interprets this exemption to apply only to cable systems that receive a superstation signal by satellite, and not to those that receive the same signal by terrestrial means such as microwave.^{27/} For

^{26/} Section 325(b)(1)(D).

^{27/} Report and Order at para. 142.

those systems, they must either obtain retransmission consent or switch to satellite reception.

There is no public interest justification for this result. Systems in certain regions for years have used extensive microwave networks in order to receive certain superstations. Requiring them to forgo microwave delivery, and to incur the additional expense of purchasing satellite signals from an intermediate carrier, serves no purpose in the Act. And if these systems should choose to continue to obtain microwave delivery, then they must obtain consent from stations that may not even be in a position to give it. Given that these stations are generally exempt from retransmission consent, a superstation may have bargained away that right, and could not give it to these systems even if it wished to.

Congress clearly intended to exempt certain stations from the retransmission consent requirement -- not to promote certain delivery mechanisms for those station's signals. The Commission has ample discretion to avoid this unintended and absurd result. It should not require satellite reception of superstations in order for systems to be able to carry them without consent.

CONCLUSION

For the foregoing reasons, NCTA respectfully requests that the Commission modify its rules on reconsideration to reflect the changes described above.

Respectfully submitted,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the Cable)	MM Docket No. 92-259
Television Consumer Protection)	
and Competition Act of 1992)	
)	
Broadcast Signal Carriage Issues)	
)	
Reexamination of the Effective)	
Competition Standard for the)	MM Docket No. 90-4
Regulation of Cable Television)	
Basic Service Rates)	
)	
Request by TV14, Inc. to Amend)	
Section 76.51 of the Commission's)	
Rules to Include Rome, Georgia,)	MM Docket No. 92-295
in the Atlanta, Georgia,)	RM-8016
Television Market)	

DECLARATION OF WENDELL H. BAILEY

I, Wendell H. Bailey, declare the following:

1. I am Vice President of Science and Technology for the National Cable Television Association. I have held this position since 1981. In this capacity, I am familiar with cable television system design and technology. I am also familiar with the FCC's rules and regulations governing cable carriage of broadcast signals. I submit this declaration in support of NCTA's petition for reconsideration of the requirement that cable operators provide on-channel carriage to UHF stations even if the station's channel number is outside the number of channels on a system's basic tier.

2. The requirement that operators carry UHF stations on-channel will cause serious technical problems for cable systems. In order to accommodate a broadcast station's request for carriage on a channel number outside an existing basic tier, an operator must surround that channel with traps. Traps can cause degradation to both adjacent channels, and increasingly so when placed in higher frequency bands.

3. In addition to degrading adjacent channels, use of multiple traps also can adversely affect the overall performance of the cable system. Therefore, most operators limit the number of traps used on any system to 3-4 traps.

4. In many systems, installing traps so that basic-only subscribers can obtain on-channel carriage of UHF stations is also labor intensive. A separate truck roll must be made to the home of each basic-only subscriber to change out existing traps and install new ones.

5. This requirement will also adversely affect cable systems' ability to comply with the tier buy-through provisions of the Cable Act and the FCC's implementing regulations. Under the tier buy-through requirements, an operator must carry all broadcast stations in the "basic tier" and must make available to basic-only subscribers any premium or pay services that are available on a per-channel or per-program basis.

6. If a cable operator attempts to use traps to secure access to its pay channels, requiring on-channel carriage of UHF television stations located on channels higher than 21 would itself be technologically difficult, and compliance with the buy-through requirements would be even more difficult, if not impossible. As explained below, such a requirement will necessitate an excessive number of traps. Each individual trap introduces a certain amount of power loss to all of the frequencies that are passed through. Multiple traps therefore can, and frequently do, lower the overall signal level to a point where a system would be in violation of the FCC's technical quality rules.

7. All TV sets sold will tune channels 2 through 13 in the VHF broadcast band. Most cable systems use the space between VHF channels 6 and 7 -- a band known as the mid-band frequency range -- to carry channels 14 through 21. In order to comply with the tier buy through regulations, a cable operator who uses traps to secure access will likely place any pay services that are generally available on the cable system in the mid-band frequency range to enable basic subscribers to have direct access to them.

8. As an example, consider a cable system with 54 channels. In normal circumstances, the cable operator might use a trap which

than VHF channel 13.) This filter would be placed at the home of anyone taking a basic package. By placing pay services below channel 13 in frequency, an operator could control access to those channels with traps as well. An operator could group these channels in order to provide two or three pay services by the addition of two or three traps. This would bring a system's trap compliment up to either 3 or 4 -- the maximum number of traps used by most cable operators. If UHF channel numbers that are higher than channel 21 are added to the mix of channels, an operator will be faced with a severe technical problem.

9. To illustrate, in the Washington D.C. area, over-the-air UHF channels 26, 32 and 45 can require on-channel carriage under the Commission's rule. Since each of these channel numbers is above the VHF channel 13 position on the cable system, an operator would now have to supply the following additional traps for basic-only subscribers: (1) a trap to pass everything below channel 13, (2) a trap to block channels between channel 21 (passed) and 25 (allowing channel 26 UHF through), (3) another trap to block channels 27 through 31 (allowing channel 32 UHF through), and (4) yet another trap blocking channels 33 up to channels 44 (allowing channel 45 UHF through).

10. There is no technically feasible way for a system to operate with these four additional traps, if any other traps are already used on the system. An operator is therefore faced with two possible options: First, it could eliminate other traps that

might be on the system. In cases where operators offer multiple pay services, this might require dropping some services in order to reclaim the power loss caused by their traps. Second, an operator could scramble all of the channels where traps are currently used to block the spectrum between UHF channels. This way any basic subscriber could gain access to all over-the-air channels in the clear and, as long as they had a cable ready TV set or a VCR, could see the basic package, plus have access to trapped pay-per-view packages or pay packages that were controlled through that mechanism and carried in the channel count between 14 and 21. All other subscribers, however, would have to accept an addressable descrambler in order to have access to all of the channels between the UHF stations which had to be scrambled in order to make a system like this technically possible.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 3, 1993.



Wendell H. Bailey